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No. 88-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

REPLY BRIEF FOR THE PETITIONER

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April 18, 1989

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The briefs of Respondents United States and Tribes (1) raise and misstate new authorities, (2) inaccurately characterize the position of the Petitioner below, (3) contain references to materials outside of the record in an effort to bolster the absence of any record evidence that the reserved water right awarded is actually needed by the Reservation, (4) misstate the effect of post-decision activities.

I. Contrary to the Tribes' assertion, the State of Wyoming's position is entirely consistent with *United States v. Hampleman* and *United States v. Parkins*.

The Tribes suggest [1] that Wyoming creates a misimpression that this matter is the first to address reserved

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[1] Respondent Tribes' Brief, p. 14, referencing the State of Wyoming's Brief for the Petitioner, at 19-20.

water rights under the 1868 Treaty.[2] In straining to support their contention, however, it is the Tribes who may mislead this Court regarding the proper standard of quantification for the Reservation's reserved water right.

The Tribes cite *United States v. Hampleman*,[3] for the proposition that the United States has previously successfully claimed a reserved water right for the Reservation. At Note 7 of their brief, the Tribes cite from the complaint in *Hampleman* to the effect that "[I]t was the intention of the parties to said treaty that all water wihin the boundaries of said reservation . . . should be reserved for the perpetual use of said Indians."[4] It is the omitted language of this reference, however, which is pertinent to the issue before the Court. The entirety of the reference reads:

> "[T]hat it was the intention of the parties to said treaty that all water within the boundaries of said reservation, *reasonably necessary for supplying the domestic needs of said Indians, watering their livestock, and the irrigation of their lands*, should be reserved for the perpetual use of said Indians as appurtenant to the lands of said reservation . . ."

(emphasis added).

The Tribes also neglect to cite the court's decree in *Hampleman*, as it regards the issue before this Court.[5] In pertinent part, it states that Mr. Hampleman was enjoined:

> "[F]rom interfering with or preventing the use by said Indian allottees of an amount of water from

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[2] Treaty with the Eastern Band of Shoshone and Bannock, 1868, J. 15, Stat. 673 (1868), a/k/a Second Treaty of Fort Bridger.

[3] No. 753 (D. Wyo. 1913). Mr. Hampleman was a state administrative official referred to as a "water commissioner." He was sued in his individual capacity.

[4] Bill of Complaint, Appendix A hereto, at 3a.

[5] Decree, Appendix B, hereto, at 13a.

> said streams *reasonably necessary* for the irrigation of their said allotments . . ."

(emphasis added).

The complaint and decree in *Hampleman* are plainly consistent with Wyoming's assertion that water rights for the Reservation are to be quantified to meet its needs, not by rote application of the PIA standard.[6]

II. Contrary to the arguments of the United States and Tribes, the State of Wyoming did not embrace the "practicably irrigable acreage" standard throughout the course of the proceedings below.

The United States and Tribes represent and argue that the State of Wyoming has taken inconsistent positions on the standard of quantification. They suggest that, although it attacks the "practicably irrigable acreage" standard before this Court, the State actually embraced that same standard throughout the course of the proceedings in the Wyoming courts below. For example, the United States advises the Court:

> [the State of Wyoming] maintained throughout the trial that "if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigations of all practicably irrigable land on said Reservation* and for stockwatering purposes.[7]

What the United States fails to mention, however, is that the State took that alternative position in its first responsive pleading, in which it was earlier stated:

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[6] Wyoming's position on quantification is equally consistent with *United States v. Parkins*, 18 F.2d 642 (D. Wyo. 1926). The *Parkins* court identified no purpose for the reserved water right which it assumed to exist other than irrigation, the sole purpose for which Wyoming asserts that a reserved right may be quantified for the Reservation.

[7] Brief of the United States, p. 19, emphasis in original.

III. *Limitation of the Reserved Right Generally*

> With respect to any reserved right which the Court may determine to exist on behalf of the United States or Tribes in this litigation . . .:
>
> * * * *
>
> 4. Wyoming affirmatively asserts that, with respect to each reservation herein, the United States intended to reserve only the minimal amount of water necessary to prevent the primary purposes of the reservation from being entirely defeated.[8]

While the alternative nature of Wyoming's response could have been more artfully drafted, it certainly created no confusion in the minds of the litigants or for the Wyoming courts. For example, the issues to be litigated were set forth in the pre-trial order:

> 5. *Contested Issues of Law*
>
> * * * *
>
> C. What is the proper measure for those reserved water rights?
>
> * * * *
>
> G. What the parameters are of any reserved water right that might have been created in Wyoming, including but not limited to:
>
> (i) Whether the amount reserved is the quantity of water which is absolutely necessary to prevent the purposes of the reservation from being entirely defeated; or
>
> * * * *
>
> (iii) Whether the quantity of water reserved for the Wind River Indian Reservation, if any, is the amount of water sufficient to irrigate all the practicably irrigable

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[8] Respondent Tribes' Brief, Appendix A, p. 2a.

> acreage on the reservation and for related domestic and stock-watering uses only . . . .[9]

Thereafter, the legal question of the appropriate quantification standard was one of the primary issues in controversy.

III. References to materials outside the record of the proceedings below do not assist and may mislead the Court.

The Tribes and United States frequently refer to material outside the recording of the proceedings below to bolster their argument that a reserved water right award for PIA is calculated to meet the Reservation's needs. For example, although at trial the Tribes presented no evidence of their need for the award, the Tribes now rely on the report of the post-trial "WINDS Project" [10] to demonstrate that the Reservation is in need of water.[11] Such extra-record material should be viewed with skepticism since it constitutes nothing more than a belated attempt to obscure the absence of record evidence supporting the Respondents' arguments. For example, the Reservation's tax commissioner has been quoted as saying:

> If the U.S. Supreme Court does not agree with the tribal PIA standard, then the recently completed Wind River Indian Needs Determination Survey (WINDS) would suffice to show the requirement for future usage to develop the reservations's economy.[12]

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[9] Order of Pre-trial Conference and Order on Motions, November 10, 1980, Appendix C, hereto, p. 14a.

[10] Respondent Tribes' Brief, Appendix E, at p. 25a.

[11] Respondent Tribes' Brief, pp. 46-47.

[12] *Chiefs Gazette*, Wyoming Indian High School Student Newspaper, February 1989 issue.

Even the WINDS report, however, does not demonstrate how the award of yet another reserved water right will ameliorate the problems of the Reservation described by the report.

IV. Contrary to the assertion of the Tribes, the State of Wyoming did not seek to create the impression that the Tribes and the State are on the verge of open warfare.

The Tribes assert that the State of Wyoming sought to create the impression that the Tribes and the State are on the verge of warfare,[13] and that an agreement on water and tax issues[14] was entered into to gain an advantage in the litigation. To the contrary, the State of Wyoming agrees with the Tribes in their assertion that relations between these sovereigns have improved. Wyoming was prompted to enter an interim one-year agreement with the Tribes in which the State agreed to forego tax revenues from the Reservation and provide other funds primarily for the purpose of preventing the Tribes' enforcement of their federal reserved water right during 1989.[15]

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[13] Respondent Tribes' Brief, p. 19.

[14] It is anticipated that the Court's ruling in *Cotton Petroleum v. New Mexico*, 106 N.M. 517, 745 P.2d 1170 (N.M. App. 1987), prob juris. noted, 108 S.Ct. 1466, 99 L.Ed.2d 696, will substantially resolve the "long standing dispute regarding this overlapping taxation." Respondent Tribes' Brief, p. 20, fn. 26.

[15] The State of Wyoming originally stated that Wyoming was prompted to enter the interim one-year agreement "simply to prevent the Tribes' enforcement of their Federal reserved water rights during 1989." State of Wyoming's Brief for the Petitioner, p. 10.

CONCLUSION

The judgment of the Wyoming Supreme Court, insofar as it affirmed the award to the Tribes of a federal reserved water right based on a quantification established by practicably irrigable acres, rather than any concept of necessity, should be reversed and remanded with instructions to enter a decree awarding a federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation, which are not and have never been awarded state water rights.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING

No. 753

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

ALBERT HAMPLEMAN,
Defendant.

BILL OF COMPLAINT

TO THE HONORABLE JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF WYOMING:

The United States of America, in its own behalf and in behalf of its wards, the Shoshone Indians hereinafter named, residing in the state and district of Wyoming, by Hilliard S. Ridgely, United States Attorney for said district, acting by direction of the Attorney General, brings this, its bill of complaint, against the defendant, and for cause of action states:

I.

That the Shoshone or Wind River Indian Reservation was established by executive proclamation on the 24th day of February, 1869, pursuant to treaty concluded on the 3rd day of July, 1868, between the complainant and the Eastern Band of Shoshones and the Bannock Tribe of Indians, said treaty being consented to by the Senate of the United States on the 16th day of February, 1869. Said reservation embraced a tract of land within the present judicial district of Wyoming, set apart for the

use and occupation of the Shoshone tribe of Indians, the boundaries thereof being defined by the terms of said treaty as follows:

> Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and the Papa Agie Rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to the head waters of Owl Creek and along middle of channel of Owl Creek to place of beginning;

That by the terms of said treaty the said Shoshone Indian tribe relinquished all title, claims or rights of possession, use or occupancy in and to any portion of the territory of the United States except such as was embraced within the limits aforesaid, and the complainant, as a consideration for such relinquishment of title or rights to any other portion of the territory of the United States, agreed to protect said Indian tribe in the possession and occupation of said reservation, and to establish schools, workshops, and to furnish certain supplies, tools and implements, described in said treaty for the education and industrial advancement of said tribe in the arts of peace and civilization; to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on agriculture and stock-raising; said treaty further provided for the selection of tracts of land by such individual members of the tribe as should desire to commence farming.

II.

That the lands included within said reservation are arid in character and incapable of producing agricultural crops successfully without irrigation; that portions of said reservation include lands unfit for cultivation, but

which are adapted to pasturage and grazing and feeding of livestock thereon; that it was the intention of the parties to said treaty that all water within the boundaries of said reservation, reasonably necessary for supplying the domestic needs of said Indians, watering their livestock, and the irrigation of their agricultural lands, should be reserved for the perpetual use of said Indians as appurtenant to the lands of said reservation; that the lands within said reservation have at all times since the creation thereof been used and occupied as the home and abiding place of said tribe of Indians, with the exception of a portion ceded and relinquished by agreement approved by Act of Congress March 3rd, 1905; that prior to said cession certain members of said Indian tribe hereinafter named selected allotments of land within what is now the ceded portion of said reservation, all of which allotments have been approved and patented under the General Indian Allotment Act of 1887.

That Annie Duncan, a member of said Shoshone tribe of Indians, and the head of a family, selected as her allotment of the lands of said reservation the northwest quarter of the southeast quarter (NW¼SE¼), and the northeast quarter of the southwest quarter (NE¼SW¼) of Section twenty-seven (27), township eight (8) north of range three (3) east W. R. M., Wyoming, containing eighty acres of the lands of said reservation, said selection being dated July 8, 1905, approved June 4, 1906, and a tract patent was issued to her therefor by complainant on the 6th day of May, 1907; that about sixty-five acres of her said allotment are under irrigation and in cultivation, producing valuable crops of hay, grain and vegetables; that the water for the irrigation of her said lands is diverted from a non-navigable stream known as the South Fork of Mud Creek, rising and flowing its entire length within the original boundaries of said reservation, and discharging its waters into Owl Creek on the northern boundary of said reservation; that

the waters of said South Fork of Mud Creek are her only source of supply for domestic use, livestock, and the irrigation of her allotment lands, and such water is necessary for the cultivation of her allotment and the maturing of crops thereon; that the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation of and the production of crops on her said allotment of land; that said Annie Duncan is married to William Duncan, to which union have been born the following named Indian children, all being minors: Robert L. Duncan, Francis C. Duncan, William E. Duncan, Clyde Duncan, Bessie Duncan, Eva Duncan and Ida Mae Duncan; that Francis C. Duncan and Bessie Duncan are now deceased; that Annie Duncan, the mother of said children and head of an Indian family as aforesaid, made the following described allotment selections of land on said reservation for her minor children above named on the 8th day of July, 1905, all of which were approved on the 4th day of June, 1906, a trust patent being issued to each of said minors for their respective allotments on the 5th day of May, 1907:

For Eva Duncan, the NE¼SE¼ of section 27, and the NW¼SW¼ of section 26, twp. 8 N. of Range 3 E. W. R. M., Wyoming, containing 80 acres; that about 20 acres of said allotment are already in cultivation and under irrigation from a ditch taken out of the South Fork of Mud Creek, above referred to, and produces successful crops of hay, grain and vegetables by irrigation; that an additional acreage of said allotment, the exact amount of which cannot now be stated, may be reclaimed by irrigation; that the waters of said South Fork of Mud Creek are the only source of supply for irrigating said allotment of land and furnishing domestic and stock water supply for said allottee and the use of the waters of said stream on the basis of one cubic foot of water per second of time per 70 acres is reasonably necessary for the ir-

rigation of said land and the successful cultivation of crops thereon.

For Ida Mae Duncan, minor child, the NE¼-NE¼ of Section 33, and the SW¼-SW¼ of Section 27, Twp. 8 II. of Range 3 E. W. R. M., Wyoming, containing 80 acres; that approximately 30 acres of said allotment have been placed in cultivation, producing valuable crops under irrigation through a ditch taken out of South Fork of Mud Creek above referred to, and the water from said stream is the only source of supply for the irrigation of said allotment and the use of water from said stream on the basis of one cubic foot of water per second of time for each 70 acres is reasonably necessary for the successful cultivation of said allotment of land.

For Francis C. Duncan, the SE¼-NW¼ and lot numbered 3 of Section 5, Twp. 8 N. of Range 2, E. W. R. M., Wyoming, containing 80.26 acres, of which allotment 76 acres are irrigable and 55 acres are already under ditch and producing valuable crops, being irrigated through a ditch taken out of Red Creek, a natural stream rising and flowing its entire length within said reservation and discharging its waters into Owl Creek on the northern boundary of said reservation. That the use of the waters of said stream is reasonably necessary for domestic and stock use and for the irrigation of said allotment on the basis of one cubic foot of water per second of time to each 70 acres thereof, in order to cultivate and produce crops on said allotment, and is the only source of water supply for said purpose; that since the death of said Francis C. Duncan, his estate has been in process of administration and under the laws of descent governing the inheritance of Indian lands upon said reservation, the father, mother and surviving brothers and sisters of said decendent named in this bill or complaint will inherit his property.

For Robert L. Duncan, the SW¼-NW¼ and lot numbered 2 of Section 5, Twp. 8, N. of Range 2 E. W. R. M.,

Wyoming, containing 80.22 acres; that 70 acres of this allotment are under irrigation and used in the production of valuable crops irrigated from a ditch taken out of Red Creek, as above described; that the waters of said stream are the only source of supply for domestic and stock use and the irrigation of said allotment, and that the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation and successful cultivation of crops on said allotment.

For Clyde Duncan, the S¼-SW¼ of Section 34, Twp. 9, N. of Range 2 E. W. R. M., Wyoming, containing 80 acres. All of this allotment is irrigable and 70 acres thereof are now under cultivation and used in the production of valuable crops irrigated through a ditch taken out of Red Creek, as above described; that the waters of said Red Creek are the only source of supply for domestic and stock use and the irrigation of this allotment and the use of one cubic foot of water per second of time from the flow of said stream for each 70 acres thereof is reasonably necessary for the successful cultivation thereof.

For the heirs of Bessie Duncan, deceased, the NE¼-SW¼ and NW¼-SE¼ of Section 34, Twp. 9, N. of Range 2, E. W. R. M., Wyoming, containing 80 acres; that 75 acres of this allotment are irrigable and 65 acres are already under cultivation and used in the production of valuable crops irrigated from a ditch taken out of Red Creek, as above described; that the waters of said stream are the only source of supply for domestic and stock use and for the irrigation of this tract and the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the successful cultivation of said allotment; that the heirs-at-law of said Bessie Duncan, deceased, are, under the rule of inheritance obtaining upon said reservation, the father, mother, brothers and sisters of said decedent named in this bill of complaint.

For William E. Duncan, lot numbered 5 of Section 34 and the SE¼-SE¼ of Section 33, Twp. 9, N. of Range 2, E. W. R. M., Wyoming, containing 79.94 acres. About 40 acres of said allotment are under irrigation and producing valuable crops from a ditch taken out of Red Creek, as above described, which forms the only source of supply of water for domestic and stock use and the irrigation of said allotment; that the use of one-half cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation of said allotment in order to produce crops thereon.

That the volume of water reasonably necessary to be supplied from the South Fork of Mud Creek and from Red Creek respectively for domestic and stock use and for the proper irrigation of the allotments of the above named Indians will exhaust the entire natural flow of both of said streams; that complainant, pursuant to applications made by said allottees and under and pursuant to authority set forth in the General Indian Allotment Act of 1887, has authorized the diversion of water from said streams by said allottees, and through its proper agencies maintains a supervision of said lands, ditches, headgates and waterrights so used by said Indian allottees; that the rights, privileges and obligations required and assumed by complainant and the said tribe of Indians by the treaty creating said reservation, have at all times since the ratification of said treaty and the establishment of said reservation by executive proclamation, remained in full force and effect, and complainant has at all of the times herein mentioned been in possession and control of the lands included in the said Indian allotments and the ditches, headgates and other irrigation works constructed for the irrigation thereof and appurtenant thereto.

III.

That notwithstanding the fact that the lands, ditches and water rights of the Indian allottees named in this bill are within the absolute and exclusive jurisdiction of

complainant, the defendant, Albert Hampleman, claiming to act as an officer of the state of Wyoming, wrongfully and without warrant of law came upon the lands of said Indian allottees, Annie Duncan, Ida Mae Duncan and Eva Duncan, as hereinbefore described, during the season of 1911, and closed the headgates of their ditches taken out of the South Fork of Mud Creek on said reservation, and did by so closing said headgates, cause the natural flow of said stream to be retained in the channel thereof and to be discharged in the channel of Owl Creek, and did thereby deprive said Indian Allottees of the use of the waters of said South Fork of Mud Creek, and did thereby cause said allottees to suffer the loss of their second cutting of alfalfa hay upon their respective allotments, growing on about an area of 100 acres thereof, for want of water for the necessary irrigation of said hay lands, which cutting or crop of alfalfa, had it not been for the interference and trespass of defendant in shutting off irrigation headgates as aforesaid, would have been irrigated by said allottees and harvested and of the value of $500.00: that during the irrigation season of 1912, the said Albert Hampleman, defendant, claiming to act as an officer of the State of Wyoming, wilfully and without warrant of law again closed all of the headgates of the irrigation ditches maintained by said allottees on Red Creek and the South Fork of Mud Creek respectively, thus causing the complete natural flow of said streams to flow down the channels thereof into Owl Creek, which said wrongful closing and shutting down of the headgates as aforesaid caused the said allottees to be deprived of the use of the waters of said streams, and did cause them great loss and damage, to wit: a crop of about 40 acres of oats and about 40 acres of alfalfa growing on their said allotments, the exact amount of which loss complainant is unable to state in dollars and cents; that the said defendant, Albert Hampleman, during the irrigation seasons of 1911 and 1912 continuously persisted in his interference with the headgates of said ditches on

said Indian allotments situated on the South Fork of Mud Creek and upon Red Creek within said reservation, and deprived said allottees of the use of the waters of said streams for the irrigation of their crops until the close of the irrigation season of 1912, and the said defendant, Albert Hampleman, claiming to act as an officer of the state of Wyoming, wrongfully and without warrant of law, has threatened to again shut the headgates of said ditches constructed for the irrigation of said allotted lands, and to exercise control and supervision of the same, and to govern and distribute the waters of said streams, and complainant believes and therefore alleges the fact to be that said defendant intends to and will continue so to interfere with, harass and annoy its said Indian allottees and close the headgates of their ditches from time to time, and to deprive them of the water of said streams reasonably necessary for the irrigation of their said lands, and to which water they are lawfully and justly entitled, and which water of said streams is essential and necessary for their use in the irrigation of their lands on said reservation, to the great and irreparable damage and injury of complainant and its Indian wards and allottees named as aforesaid, unless said defendant is restrained and enjoined from so doing by the order and decree of this court; that the acts and doings of said defendant herein complained of were and are without the license, consent or approval of your complainant, and without the license, consent or approval of the Secretary of the Interior of the United States; that plaintiff has no plain, speedy and adequate remedy at law, and unless defendant is restrained and enjoined from in any manner trespassing upon and interfering with the said lands, ditches and headgates, complainant and its Indian wards will suffer great and irreparable injury; that said acts of trespass in closing the headgates of ditches constructed and used for the irrigation of said lands have been of a continuous character, and the threats and intentions of defendant with reference thereto indicate that such acts of trespass

will be of a continuous character in the future; that said continued acts of trespass heretofore committed and acts of trespass on the part of defendant threatened and intended to be committed in the future will tend to alter the character of the property of said Indian allottees and occasion irreparable loss and damage, if not a total destruction of the value of said allotments for agricultural purposes unless said unlawful and unwarranted acts of trespass be restrained by order of this court.

WHEREFORE, complainant prays that the defendant, his agents, servants and employees, be enjoined during the pendency of this suit from trespassing upon or in any manner interfering with the lands, ditches and headgates of said Indian allottees; that on the final hearing of this case the defendant, his agents, servants and employees be perpetually enjoined from committing any trespass upon, and from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing from their natural channels to the headgates of said Indian allottees named in this bill, and from in any manner interfering with the headgates of said Indian allottees situate on either of said streams, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of the cubic foot of water per second of time for each 70 acres of irrigable land on said allotments, and that complainant have such other, further and general relief as may be in accordance with equity and good conscience.

/s/ Hilliard S. Ridgely
HILLIARD S. RIDGELY
United States Attorney
and Solicitor for Plaintiff.

UNITED STATES OF AMERICA)
) ss.
DISTRICT OF WYOMING.)

HILLIARD S. RIDGELY, being first duly sworn, deposes and says: that he is the regularly appointed, qualified and acting United States Attorney in and for the district of Wyoming: that he has read the foregoing bill of complaint, knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

/s/ Hilliard S. Ridgely

Subscribed and sworn to before this 5th day of September, A.D. 1913.

/s/ _____ _____
Clerk United States District Court, District of Wyoming.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING

No. 753

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT HAMPLEMAN,
Defendant.

DECREE

Now on this day the above entitled cause coming on to be heard, the plaintiff appearing by DAVID J. HOWELL, Assistant United States Attorney for the District of Wyoming, and the defendant, *ALBERT HAMPLEMAN*, appearing by his attorneys, DOUGLAS A. PRESTON, Attorney General for the State of Wyoming, and WILFRID O'LEARY, Deputy Attorney General for the State of Wyoming, and a stipulation by and between the parties hereto having heretofore been filed admitting certain of the allegations contained in plaintiff's bill of complaint, and the Court having heard the testimony of the witnesses produced by said plaintiff, and the arguments of counsel, and being fully advised in the premises, doth find for the plaintiff, and against the defendant, generally, and that the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of plaintiff.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED, that the defendant, ALBERT HAMPLEMAN, his servants, agents and employees, be, and they are hereby perpetually enjoined from hereafter committing any trespass upon, or from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing down their natural channels to the headgates of the said Indian allottees named in plaintiff's bill of complaint, and from in any manner interfering with the headgates of said Indian allottees situate on either of said streams, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of one cubic foot of water per second of time for each seventy (70) acres of irrigable land on said allotments.

IT IS FURTHER ORDERED that the defendant herein shall pay the costs of this action, to be taxed.

Dated this 26th day of June, A.D. 1916.

/s/ John R. Rivers
Judge

APPENDIX C

IN THE DISTRICT COURT
FIFTH JUDICIAL DISTRICT

STATE OF WYOMING)
) ss.
COUNTY OF WASHAKIE)

Civil No. 4993

IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

ORDER ON PRE-TRIAL CONFERENCE AND ORDER ON MOTIONS

On October 23, 1980 a Pre-Trial Conference was heard in the above-entitled matter. Counsel was present for the United States, the State of Wyoming, the Shoshone and Arapahoe Tribes, and several individual Defendants.

This Order shall govern the trial set to begin December 1, 1980, concerning the reserved water rights pertinent to the Wind River Indian Reservation and reflects the positions taken by counsel and the rulings made by the Special Master at the Pre-Trial Conference.

1. *Jurisdiction and Parties.* The Court has ruled this action to be a general stream adjudication. The United States, supported by the Shoshone and Arapahoe Tribes as *amicus curiae*, objected to the jurisdiction of the Court and preserved that objection. The Tribes have intervened but preserve all objections to the jurisdiction of the Court.

2. *General Nature of the Claims of the Parties.* The United States, essentially realigned as Plaintiff, asserts

water rights for the Wind River Indian Reservation. The Tribes, similarly realigned as Plaintiffs, join in that claim but seek a larger quantification than does the United States. The Tribes also assert a reserved right for lands held in fee by tribal members and their descendants and for land that may be reacquired by the Tribes. The Tribes also seek an open-ended decree to provide for unforeseeable future needs. The State of Wyoming, essentially realigned as a Defendant, and some of the Defendants, other than the United States and the Tribes, contest these claims on both factual and legal bases as set forth in their respective Pre-Trial Statements. Those Pre-Trial Statements, including those filed for the September, 1979 Pre-Trial Conference, are incorporated herein by reference.

3. *Uncontroverted Facts.* The only uncontroverted fact is the exterior boundaries of the Wind River Indian Reservation, which has been stipulated to by the United States, The Tribes and the State. All other issues of fact are controverted.

4. *Contested issues of Fact.* The following are the contested issues of fact concerning the measurement of the reserved water rights for the reservation. There is at this time no agreement among counsel for the major parties on any of this anticipated evidence:

A. The purposes for which the lands comprising the Wind River Indian Reservation were withdrawn.

B. Whether Congress intended to reserve any water rights on behalf of the Wind River Indian Reservation. (Wyoming's presentation at trial concerning this issue is hereby limited to a narrative offer of proof not to exceed a thirty-minute oral presentation with supporting documents).

C. The number of practicably irrigable acres on the Wind River Indian Reservation.

D. The injury to any State-awarded appropriative water rights resulting from the exercise of Federal reserved rights, if the Master finds any such reserved rights to exist.

5. *Contested Issues of Law.*

A. Whether the United States and the Tribes, in the creation of the Wind River Reservation, reserved water rights for the benefit of the Tribes.

B. If reserved water rights were created in Wyoming, whether the reserved rights doctrine delineates the strict boundaries of those rights.

C. What is the proper measure for those reserved water rights?

D. Whether the equal-footing doctrine dictates that, by admitting Wyoming into the union on an equal footing with the original thirteen states, the United States did not intend to reserve any water in the State of Wyoming. (Wyoming's presentation at trial concerning this issue is hereby limited to a narrative offer of proof not to exceed a thirty-minute oral presentation with supporting documents).

E. Whether the United States is estopped from claiming any reserved water rights in Division No. 3.

F. Whether the water rights must be quantified once and for all or whether the decree should be left open-ended.

G. What the parameters are of any reserved water right that might have been created in Wyoming, including but not limited to:

(i) Whether the amount reserved is the quantity of water which is absolutely necessary to prevent the purposes of the reservation from being entirely defeated; or

(ii) Whether any reserved water rights which may be found by the Special Master to exist on behalf of the Wind River Indian Reservation are limited in quantity to the amount necessary to fulfill the agrarian purpose for which the reservation was created; or

(iii) Whether the quantity of water reserved for the Wind River Indian Reservation, if any, is the amount of water sufficient to irrigate all the practicably irrigable acreage on the reservation and for related domestic and stock-watering uses only; or

(iv) Whether reserved water rights arise only in connection with a Federal reservation of land and may be used only within the boundaries of the land with which it is associated.

H. What is the quantity of any reserved water rights that may have been created?

I. Whether the waters, once a measurement has been established, may be used for other purposes, and if so, must this be limited so that an increased burden is not placed on the water source.

J. What are the priority dates of any reserved water rights which might be found to exist by the Special Master, in connection with lands continuously held by the Tribes, lands ceded away but later restored to the Tribes, and lands sold to non-Indians but later reacquired by or restored to the Tribes.

K. Whether the Tribes' reserved water rights include water for lands held in fee by tribal members or direct descendants of tribal members.

L. Whether the Tribes' reserved water rights include water for land currently owned in fee by non-Indians which the Tribes expect to reacquire in the future.

M. What are the geographical limits on the use of any reserved water rights that might be found to exist?

N. Whether a reserved water right is terminated when it is leased, permitted, licensed or otherwise disposed of to a non-Federal entity or used for the achievement of goals separate from those for which the right was originally reserved.

O. Whether reserved rights apply to groundwater.

P. The proper date, not before 1905, to be used in determining practicability of irrigation; Wyoming's presentation concerning irrigation technology as of any earlier date shall be limited to an offer of proof with supporting documents.

Q. Whether any reserved rights which might be found to exist by the Special Master are junior to water rights issued by Wyoming which predate the creation of the reserved right.

6. *Special Master's Rulings on Certain Contested Issues of Law and Trial Procedure.* There has already been a trial before the Master, extensive briefing, and arguments on the boundaries of the reservation, the existence of reserved water rights on the reservation, the purpose of the establishment of the reservation in 1868, the effect of the opening or cession of a portion of the reservation in 1905, and the dates of priority of various claimed water rights on the reservation. In proposed pre-trial statements and at the Pre-Trial Conference, various issues were raised, objected to and argued, and as a resolution of those issues the following rulings are now made in regard to the subject matter of the evidentiary trial to begin on December 1, 1980.

A. It is the Master's duty to determine the "nature, extent, and relative priority of the water rights of all persons in the river system." The State has asked the Master to decree that "any reserved water rights awarded by this litigation to the United States must be administered by the Wyoming State Engineer." The question of who shall administer the water rights goes beyond the

reference made by the Court to the Master and will not be determined by the Master. Thus, evidence or arguments relevant only to the question of administration of the water rights will be excluded at trial.

B. Each and every individual Defendant shall retain the right to assert, at the proper time, all affirmative defenses asserted by any party to the captioned matter.

C. The United States and the Tribes argued that evidence on the impact of tribal water rights on non-Indians is both irrelevant under Supreme Court decisions and prejudicial. The Master ruled that the tribal water rights should not be determined by its impact on later acquired rights and that extended testimony on impact would be prejudicial. However, the individual Defendants shall be entitled to present their case in chief, which portion of said trial shall commence at the close of the State of Wyoming's case in chief. Not more than two days direct testimony will be allowed to the State and individual Defendants to present testimony regarding the impact of tribal water rights on non-Indians so long as such testimony is not repetitive or oppressive. The trial will convene in Worland, Wyoming and the Master desires that the individual Defendants and their counsel attempt to present testimony that is truly representative of the impact of the Indian claims on the use of their water rights.

D. The right of any individual Defendant to present evidence relating to and to prove the elements of any affirmative defense asserted in the captioned matter is preserved until such time as all of the claims of the United States and the Indian Tribes have been fully determined. The presentation of evidence relating to any such affirmative defense shall be heard at the same time the Master hears any challenges to individual water rights pursuant to the Order of June 26, 1980 and the stipulation contained therein.

7. *Exhibits.* The parties, by mutual agreement, will submit copies of their exhibits to counsel for the major parties at least (10) days before the commencement of

trial, unless otherwise agreed, or persuasive reasons are shown for inability to present exhibits within the ten-day rule.

8. *Depositions.* Any party proposing to offer all or any portion of a deposition shall notify opposing counsel at least ten (10) days before trial of the offers to be made (unless the necessity of using the deposition develops unavoidably thereafter). If objection is to be made, or if additional portions of the deposition are to be requested, opposing counsel will notify offering counsel at least five (5) days before trial of such objections or requests. If any differences cannot be resolved, the Master must be notified in writing of such differences at least three (3) days before trial.

9. *Discovery.* Discovery is ongoing at the present time. Depositions currently scheduled to be taken by attorneys for the State of Wyoming of certain experts working on behalf of the United States and the Tribes, which depositions are scheduled as per an agreement between these parties for the week of November 17, 1980, shall be taken pursuant to that agreement. Any such expert not available for deposition prior to trial shall not be allowed to present testimony at trial. All other oral depositions shall be concluded no later than November 21, 1980.

10. *Witnesses.* At least ten (10) days before the trial commences all parties shall submit to opposing counsel and to the Master the names, addresses, and general subject matter of testimony of any and all witnesses that will or may be called by the party to testify. This restriction shall apply to rebuttal witnesses, unless the necessity of their testimony reasonably cannot be anticipated within the ten-day rule.

11. *Other Matters.*

A. Local counsel representing private appropriators are not precluded from participating in the trial by their non-attendance at the Pre-Trial Conference. However, should they choose to call witnesses other than those

designated by the State of Wyoming, the names, addresses, and a summary of the witness' testimony must be provided to all opposing counsel and the Master at least ten (10) days prior to trial.

B. The United States and the Tribes shall each present their entire case in chief followed by the entire case in chief of the State of Wyoming and any private parties contesting the tribal claims and complying with the requirements of this Order.

12. *Settlement Possibilities.* Settlement has been discussed by the parties, but the prospects at this time are unknown.

13. *Ruling on Motions from October 23 Pre-Trial Conference.*

A. Upon agreement of the United States to waive the 10-day rule, there came before the Special Master Wyoming's Motion for Partial Summary Judgment on In-Stream Flow Claims made on behalf of the BLM. Based upon briefs submitted and oral argument made, IT IS HEREBY ORDERED that the State of Wyoming's Motion for Partial Summary Judgment is hereby denied.

B. There also came before the Special Master Wyoming's Motion to Strike the testimony of Michael O'Grady and portions of the testimony of Ronald Billstein. Based upon briefs submitted and oral arguments made, IT IS HEREBY ORDERED that Wyoming's Motion to Strike the testimony of Michael O'Grady and portions of the testimony of Ronald Billstein is hereby denied.

DATED this 10th day of November, 1980.

/s/ Teno Roncalio
TENO RONCALIO
Special Master

cc: All Attorneys of Record
and Pro Se Defendants